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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) DEFENSE OBJECTION TO
) MOTION TO ENTER UBS
) EMAILS (SIC) AND MOTION TO
) ENFORCE ORDER OF
) GENERAL PRECLUSION OF
) LATE DISCLOSED UBS
) EVIDENCE
)

22 MOTION

23 Steven DeMocker, by and through counsel, hereby objects to the State's Motion
24 to Enter UBS Emails and urges this Court to affirm its prior order precluding late
25 disclosed UBS evidence.

26 MEMORANDUM OF POINTS AND AUTHORITIES

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAR 11 PM 12:03

JEANNE HICKS, CLERK

BY: S Smisko

Although Mr. DeMocker has been in custody since October of 2008 and the State has known since July 2008 of his employment at UBS, the State did not subpoena Mr. DeMocker's UBS emails until December 2009. Twenty-three thousand pages of UBS documents were first disclosed to the defense on February 18, 2010, with less than three months to trial in a death penalty case that has been pending for over sixteen months. On February 24, 2010, the defense moved to preclude late disclosed UBS evidence. The defense explained that these documents constituted ten bankers boxes of printed documents. As the defense explained at oral argument on the motion, if the Court permits any of these UBS emails to be admitted at trial, over defense objection, the defense is obligated to review every page of the disclosure. Such a review is impossible given the volume of the State's late disclosure. The Court found that the State had not acted with due diligence in requesting the information from UBS and disclosing the information. The Court generally precluded the UBS emails.

On March 8, with approximately eight weeks to trial, the State has identified 197 emails from among the 23,000 pages and requests “the use of the attached emails at trial.” The Court should deny the State’s request and affirm its original order based on the State’s failure to exercise due diligence, failure to show good cause for its failure to exercise due diligence, Rule 15 disclosure violations and the prejudice to Mr. DeMocker of the late disclosure and impossibility of reviewing the 23,000 pages of late disclosed UBS documents. These emails are also irrelevant and should be precluded on the grounds of Arizona Rule of Evidence 402.

I. Business Split

The emails EM01-140 are identified by the State as relating to the business split between Barb Onon and Mr. DeMocker. The State has been aware since the inception of this case that the business relationship between Ms. Onon and Mr. DeMocker was being divided in the spring and summer of 2008. There is no excuse for the State's

1 delay in waiting over a year to subpoena these documents from UBS.¹ These
2 documents should be excluded pursuant to Rule 15.7.

3 In addition to being late disclosed as a result of the State's failure to exercise due
4 diligence, these emails are also irrelevant. The split up of the UBS business partnership
5 between Mr. DeMocker and Ms. Onon's was nearly finalized at the time of Ms.
6 Kennedy's death and has no bearing whatsoever on any fact at issue in this matter. The
7 Court should therefore exclude these 140 emails on the additional ground of Rule 402 of
8 the Arizona Rules of Evidence.

9 **II. Emails Discussing the Death of Carol Kennedy**

10 The State identifies EM 141-143 as "discussing the death of Carol Kennedy."
11 These emails, in addition to being late disclosed, are also irrelevant. These pages are
12 one email string between Mr. DeMocker and a Certified Financial Planner. Mr.
13 DeMocker is explaining his absence and withdrawal from a program following Ms.
14 Kennedy's death. In addition to being late disclosed, these emails are also entirely
15 irrelevant and should likewise be excluded under Rule 402 of the Arizona Rules of
16 Evidence.

17 **III. Emails between Steven DeMocker and Carol Kennedy**

18 Emails EM144-156 are identified by the State as between Steven DeMocker and
19 Carol Kennedy. However, only EM 144-148 are emails between Mr. DeMocker and
20 Ms. Kennedy. These emails should be excluded as the State waited over a year to
21 subpoena documents from UBS and has no good cause for its failure to exercise due
22 diligence.

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27 ¹ These documents may also raise privacy concerns as they identify UBS clients by name and also identify the
28 value of the clients' production to UBS as well as the amount of money invested by client name.

1 Emails EM149-156 are improperly identified by the State as being between Ms.
2 Kennedy and Mr. DeMocker. These emails are between Mr. DeMocker and others.
3 They are late disclosed and should be excluded.

4 **IV. Emails dated July 2, 2008**

5 Emails EM157-168 are emails dated July 2, 2008. These emails are late
6 disclosed and should be excluded on this basis alone. Certainly the State knew that Mr.
7 DeMocker sent and received emails from work on July 2, 2008, well before it
8 subpoenaed these documents in December of 2009. There is no good cause for the
9 State's delay and exclusion is the appropriate remedy given the prejudice of otherwise
10 forcing the defense to review 23,000 pages of disclosure mere weeks before trial.

11 The documents in this range are also irrelevant. The emails range from
12 conversation about casual dress code on the 4th of July to an individual client investment
13 question. There is no reason to believe that any of this communication is relevant to
14 any fact in question and these emails should be excluded under Rule 402.

15 **V. Emails By Cell Phone**

16 The State indicates that Emails EM169-185 are "emails by cell phone." Instead
17 they are out of office emails or other emails indicating that Mr. DeMocker has a cell
18 phone. These emails are late disclosed and should be excluded for that reason alone.
19 They are also irrelevant and should be excluded pursuant to Rule 402.

20 **VI. Barbara Onon emails**

21 Emails EM186-196 are emails between Barbara Onon and Mr. DeMocker. The
22 State has been aware of Ms. Onon since July of 2008, knew that Mr. DeMocker and Ms.
23 Onon worked together and that they would have emails between them as a result of their
24 work. Yet the State did not request these emails from UBS until December 2009.
25 These emails should be excluded on this basis. These emails are also irrelevant, bear no
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1 relationship to any fact at issue in this case and should therefore also be excluded
2 pursuant to Rule 402.

3 **VII. Email re Closing of Joint Account**

4 Email EM 197 does not indicate who sent it or from which email. It also
5 includes no address to whom it was sent. The email time and date stamp indicate it was
6 sent prior to Ms. Kennedy's death at 3:34 in the afternoon on July 2, 008. This email
7 should be excluded based on its late disclosure, irrelevance and inability to identify who
8 it was sent to or from.

9 As noted in the original motion to preclude, the State's failure to request the UBS
10 emails and information until over fifteen months after this case was pending and
11 subsequent dump of over 23,000 pages on the defense with only three months to trial is
12 a continuation of its abuse of the disclosure process that has plagued this case from the
13 outset. As if to help demonstrate the prejudice caused by its disclosure violations, at an
14 interview of a witness on February 23, 2010, the State offered as an exhibit an email
15 from this batch of 23,000 late disclosed pages of UBS documents.

16 Such treatment ensures that Mr. DeMocker and his defense team cannot properly
17 review and analyze the State's evidence, research and retain the required experts,
18 prepare an independent analysis of the State's conclusions and properly prepare for
19 interviews and a trial in less than three months.

20 Rule 15.7 gives the Court wide discretion in imposing a sanction. The permitted
21 sanctions under Rule 15.7 include precluding or limiting the calling of a witness, use of
22 evidence or argument; dismissing a case; granting a continuance or declaring a mistrial;
23 holding counsel in contempt; imposing costs; or other appropriate sanctions. This Court
24 should exclude the late disclosed evidence based on the pattern of conduct evidenced by
25 the State in this case. This Court has already found that the State failed to exercise due
26 diligence in requesting this information from UBS. This Court should preclude the

1 evidence of all 23,000 pages of UBS documents on two CDs disclosed by the State
2 labeled # 6206.

3 **CONCLUSION**

4 Defendant Steven DeMocker, by and through counsel, hereby requests that this
5 Court deny the State's Motion to Enter UBS Emails and prohibit the State from offering
6 late disclosed evidence from UBS.

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8 DATED this ___ day of March, 2010.

9
10 By: 

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13 Prescott, Arizona 86302

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19 Attorneys for Defendant

20 **ORIGINAL** of the foregoing hand delivered for
21 filing this ___ day of March, 2010, with:

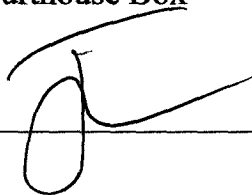
22 Jeanne Hicks
23 Clerk of the Court
24 Yavapai County Superior Court
25 120 S. Cortez
26 Prescott, AZ 86303

27 **COPIES** of the foregoing hand delivered this
28 this ___ day of March, 2010, to:

The Hon. Thomas B. Lindberg

1 Judge of the Superior Court
2 Division Six
3 120 S. Cortez
4 Prescott, AZ 86303

5 Joseph C. Butner, Esq.
6 Yavapai Courthouse Box

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